

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 01-455-A
	)	Judge Leonie M. Brinkema
ZACARIAS MOUSSAOUI	)	

**DEFENDANT’S MOTION TO RECONSIDER COURT’S ORDER OF JUNE 25, 2002  
GRANTING THE GOVERNMENT’S MOTION TO WITHHOLD PLACES OF ABODE  
OF PROSPECTIVE WITNESSES**

Defendant Zacarias Moussaoui (“Moussaoui”), through counsel, respectfully moves the Court to reconsider its Order of June 25, 2002 (dkt. no. 229) (hereafter the “June 25 Order”) granting the Government’s Motion to Withhold Places of Abode of Prospective Witnesses Pursuant to 18 U.S.C. § 3432 (filed June 24, 2002, dkt. no. 215) (hereafter the “Motion”), and order the Government to provide to defense counsel, under seal, the complete street address, including telephone number, of each of the non-expert witnesses the Government intends to call at the penalty phase of this case.<sup>1</sup>

**INTRODUCTION**

On June 24, 2002, eleven days after the Court granted Moussaoui’s motion to proceed *pro se*,<sup>2</sup> the Government moved the Court “to allow the Government to withhold the places of abode for prospective witnesses pursuant to 18 U.S.C. § 3432.” Motion at

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<sup>1</sup> Under the schedule established by the Court on May 6, 2005, this information should be furnished “at least three (3) days before jury selection,” that is, by no later than Wednesday, January 4, 2006. See Order at 2 (filed May 6, 2005, dkt. no. 1280).

<sup>2</sup> The Court granted Moussaoui’s request to proceed *pro se* at a hearing held on June 13, 2002 and in its order filed the next day. See Transcript of Motion Hearing held on June 13, 2002 at 48 (filed June 14, 2002, dkt. no. 182) (hereafter the “June 13 Transcript”); Order at 1 (filed June 14, 2002, dkt. no. 183).

1. “The indictment, the defendant’s own words, and the on-going war [against terrorism],” the Government claimed, “easily establish by a preponderance of the evidence that disclosure of the place of abode of Government witnesses could endanger their lives.” *Id.* at 3.

The next day, on June 25, 2002, at Moussaoui’s arraignment on the Second Superseding Indictment, the Court granted the Motion over his oral objection.<sup>3</sup> In granting the Motion, the Court stated:

The Court must always weigh the rights of a defendant to be able to mount an adequate defense against the rights of witnesses to be protected from any potential danger or harm.

You [Moussaoui] have publicly in court sometimes made some pretty strong statements about Americans. I don’t know how many of these witnesses are going to be American and how many may be of foreign origin. You will have the names of the witnesses, and if there are specific witnesses that you are trying to talk with, the United States can be ordered to try to make the witness available as long as it’s not going to be abusive.

I’m going to grant [the Motion]. I have the statutory authority to do it under 18 USC 3432. I do find that this is an extraordinary case, that the charges involved in the indictment are extremely serious and suggest that there could be risk to witnesses in this case.

I have already indicated we will be using an anonymous jury because of the nature of the case, and I think this ruling is consistent with that approach to this case.

Transcript of Rearraignment/Motion Proceeding held on June 25, 2002 at 30-31 (filed July 19, 2002, dkt. no. 351) (hereafter the “June 25 Transcript”). This ruling was memorialized in an order filed the same day. See June 25 Order at 1.

Subsequently, the Court stayed all proceedings in the case during the pendency

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<sup>3</sup> No written objection to the Motion was filed.

of interlocutory appeals filed by the Government. This stay was lifted by an Order filed on March 28, 2005 (dkt. no. 1244). On May 6, 2005, the Court entered a scheduling order requiring the Government “[to] file its witness list under 18 U.S.C. § 3432 at least three (3) days before jury selection.” Order at 2 (filed May 6, 2005, dkt. no. 1280). Prior to entry of that order, defense counsel met with the prosecutors who stated that the Government would not agree to provide to the defense the addresses of the Government’s witnesses.

### **ARGUMENT**

Moussaoui recognizes that motions to reconsider are not favored. *United States v. Dickerson*, 971 F. Supp. 1023, 1024 (E.D. Va. 1997) (Cacheris, C.J.), *modified*, 166 F.3d 667, 679 (4th Cir. 1999) (holding that a motion for reconsideration based on additional evidence may be denied unless the moving party provides “a legitimate reason for failing to introduce that evidence prior to the district court’s ruling on the [underlying] motion”), *rev’d on other grounds*, 530 U.S. 428 (2000); *see also Dickerson*, 971 F. Supp. at 1024 (“A motion to reconsider cannot appropriately be granted where the moving party simply seeks to have the Court ‘rethink what the Court ha[s] already thought through – rightly or wrongly.’”) (quoting *Above the Belt, Inc. v. Mel Bohannon Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983) (Warriner, J.)).

Given the changed circumstances and absence of briefing as detailed below, reconsideration of the Court’s June 25 Order is warranted.

**I. The Government Can No Longer Establish By A Preponderance Of The Evidence That Disclosure To Defense Counsel Of The Places Of Abode Of The Government’s Prospective Witnesses May Jeopardize The Life Or Safety Of Those Witnesses.**

18 U.S.C. § 3432 requires the Government to furnish to the defense a list of “the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each . . . witness.” The places of abode, however, may be withheld if the Court finds “by a preponderance of the evidence that providing the list may jeopardize the life or safety of any person.” *Id.*; see also *United States v. Edelin*, 128 F. Supp.2d 23, 29 (D.D.C. 2001).

In its June 25 Order, this Court found that the Government had satisfied its burden of establishing that “the life or safety of any person” - specifically, the Government’s witnesses - may be jeopardized, and granted the Government’s motion to withhold from the defense the witnesses’ places of abode. June 25 Transcript at 30-31. When it granted that motion, however, Moussaoui was acting as his own lawyer, a factor that figured prominently in the Court’s ruling. Indeed, one of the reasons the Court gave for its decision was Moussaoui’s public statements of animosity against Americans, see *id.* at 31, a factor that had significance only because as his own lawyer, Moussaoui would have had a right under the statute to personally receive the witnesses’ addresses, and perhaps interview them as well.

Since that time of course, Moussaoui’s right to self-representation has been revoked, removing any requirement that he personally receive all of the witnesses’ identifying information.<sup>4</sup> If provision of the addresses of the witnesses is limited to

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<sup>4</sup> Moussaoui need only receive the names of the Government’s witnesses. See *United States v. Lentz*, Crim. No. 01-150-A, Order at 5 (E.D. Va. June 22, 2001) (Lee, J.) (directing that the defendant “shall only have access to the [Government] witnesses’ names”) (hereafter the “*Lentz* June 22 Order”). A copy of this Order is attached.

defense counsel with the condition that they may not divulge that information to Moussaoui absent permission from the Court,<sup>5</sup> and the information is placed under seal, the Government cannot demonstrate by a preponderance of the evidence that furnishing that information would jeopardize the life or safety of any of its witnesses. Indeed, when such a wall has been inserted between counsel and a defendant, this Court has authorized disclosure of identifying information of Government witnesses. See *Wills* August 7 Order at 1 (recognizing that disclosure of witness information only to defense counsel would “provide[ ] adequate protection to the witnesses” while permitting the defendant “a fair opportunity to mount a full defense”); see also *Lentz* June 22 Order at 5 (ordering disclosure “[o]nly [to] counsel for Defendant”).

Reconsideration of the Court’s June 25 Order also is appropriate given that at the time, the Court did not consider the option presented above of limiting disclosure to counsel only. When it decided the Motion, the Court did not have the benefit of a written response from Moussaoui given that the Motion had been filed only the day before it was ruled upon. Nor did the Court have the benefit of any briefing or oral argument from then standby counsel, who were operating under a restriction to not file any motions on Moussaoui’s behalf. See June 13 Transcript at 65.

Counsel could have pointed out, for example, that the Special Administrative Measures (“SAMs”) under which Moussaoui was being held, made it *impossible*, while

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<sup>5</sup> Disclosure presumably would include non-lawyer members of the defense team, who would operate under the same prohibitions as defense counsel. See, e.g., *United States v. Wills*, No. 99-396-A, Order at 1 n.1 (E.D. Va. Aug. 7, 2001) (Brinkema, J.) (allowing standby counsel to “share the [Government’s witness list] with any court-authorized investigators who are working on [the] case”) (hereafter the “*Wills* August 7 Order”). A copy of this order is attached.

incarcerated, for Moussaoui to communicate with, no less threaten, any of the Government's witnesses. Those measures prohibited Moussaoui from having any contact with other inmates, permitted nonlegal telephone calls only to his immediate family which were "[c]ontemporaneously monitored . . . by the FBI," permitted nonlegal visits only to his immediate family which were "[c]losely monitored by [the] . . . FBI," and required that all of his outgoing nonlegal mail be analyzed before dissemination by the FBI and seized if it contained "overt or covert discussions of or requests for illegal activities, [including] the soliciting or encouraging of acts of violence." See April 2002 SAMs at §§ 1.c., 4.a.i. & iv., 4.b.i. & iii., and 4.c.iii. & iv., respectively. These restrictive measures, which remain in effect today,<sup>6</sup> undermine the Government's claim that it is necessary to withhold witness information from Moussaoui.<sup>7</sup> For these additional reasons, reconsideration of the Court's June 25 Order is appropriate.

**II. The Government's Witness List Should Include Each Witness' Complete Home Address And Telephone Number.**

18 U.S.C. § 3432 requires the Government's witness list to include "the place of abode" of each witness. The statute does not provide a definition for "place of abode." It is true that in the past, this Court has construed that phrase to mean the witnesses' "county or city of residence." See *United States v. Wills*, Crim. No. 99-396-A, Order at 2

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<sup>6</sup> See April 2005 SAMs at §§ 1.c., 4.a.i. & d.i., 4.f.i. & iii., and 4.g.iii. & iv., respectively.

<sup>7</sup> When Moussaoui was his own lawyer, there also was the possibility that he could have threatened the Government's witnesses in his pro se pleadings or in open court. However, the Court has the power, independent of 18 U.S.C. § 3432, to police such behavior. Moreover, the witness information could have been placed under seal, providing further protection.

(E.D. Va. July 31, 2001) (Brinkema, J.).<sup>8</sup> It is equally true, however, that the Court has the authority to order the disclosure of additional information, including the home address and telephone number of the Government's witnesses.

In *United States v. Sampson*, for instance, the U.S. District Court for the District of Massachusetts construed "place of abode" to mean the witnesses' "home addresses." 297 F. Supp.2d 340, 340-41 (D. Mass. 2003). Similarly, in the prosecution of Jay Lentz in the Eastern District of Virginia, Judge Lee ordered the Government's witness list to include each witness' "name, address, and telephone number." See *Lentz* June 22 Order at 5; see also *Gregory v. United States*, 369 F.2d 185, 187-88 (D.C. Cir. 1966) (stating that 18 U.S.C. § 3432 requires the Government to furnish a "list of the names and addresses of [its] witnesses"); *United States v. Aiken*, 76 F. Supp.2d 1339, 1343 (S.D. Fla. 1999) (same).

Here, disclosure of each witness' home address and telephone number would further the purpose of 18 U.S.C. § 3432. That purpose "is to assist defense counsel in preparing the defense by interviewing the [Government's] witnesses." *Gregory*, 369 F.2d at 187-88; see also *United States v. Insurgents of Pa.*, 26 F. Cas. 499, 514 (C.C.D. Pa. 1795) (No. 15,443) ("The object of the law was to enable the party accused, to prepare for his defence, and to identify the jurors who were to try, and the witnesses who were to prove, the indictment against him."). It is expected that in the instant case the Government's witness list will include dozens of witnesses whose names, pursuant to the current schedule, need not be produced until "three days before jury selection."

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<sup>8</sup> A copy of this order is attached.

See note 1 *supra*. Given these numbers, allowing the Government to disclose only the country, county or city of residence for each witness will hamper, not assist, defense counsel in attempting to contact them.<sup>9</sup>

Moreover, as defense counsel will agree not to share with the Defendant any of the addresses or telephone numbers, and to maintain this information under seal, it makes little sense to prohibit them from receiving this information. As Judge Lee did in the *Lentz* prosecution, the Court can direct that “[o]nly counsel for Defendant shall receive the addresses and telephone numbers of the witnesses, and Defendant shall only have access to the witnesses’ names.” *Lentz* June 22 Order at 5. Accordingly, the home address and telephone number for each of the Government’s prospective witnesses should be furnished as part of the Government’s witness list.

### **CONCLUSION**

For the foregoing reasons, Defendant respectfully moves the Court to grant this motion and order the Government to provide to defense counsel, under seal, the complete street address, including telephone number, of each of the non-expert witnesses the Government intends to call at the penalty phase of this case.

Respectfully Submitted,

ZACARIAS MOUSSAOUI  
By Counsel

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<sup>9</sup> It goes without saying that “[w]itnesses, particularly eye witnesses, to a crime are the property of neither the prosecution nor the defense,” and that “[b]oth sides have an equal right, and should have an equal opportunity, to interview them.” *Gregory*, 369 F.2d at 188; *see also United States v. Tipton*, 90 F.3d 861, 889 (4th Cir. 1996) (stating that defense access to the Government’s witnesses “is a matter of right”).



\_\_\_\_\_/S/  
Gerald T. Zerk  
Senior Assistant Federal Public Defender  
Kenneth P. Troccoli  
Assistant Federal Public Defender  
Eastern District of Virginia  
1650 King Street, Suite 500  
Alexandria, VA 22314  
(703) 600-0800

\_\_\_\_\_/S/  
Edward B. MacMahon, Jr.  
107 East Washington Street  
P.O. Box 903  
Middleburg, VA 20117  
(540) 687-3902

\_\_\_\_\_/S/  
Alan Yamamoto  
643 South Washington Street  
Alexandria, VA 22314  
(703) 684-4700

#### CERTIFICATE OF SERVICE<sup>10</sup>

I HEREBY CERTIFY that on this 22nd day of August, 2005, a true copy of the foregoing pleading was served upon AUSA Robert A. Spencer, AUSA David J. Novak and AUSA David Raskin, U.S. Attorney's Office, 2100 Jamieson Avenue, Alexandria, VA 22314, by placing a copy BY HAND in the box designated for the United States Attorney's Office in the Clerk's Office of the U.S. District Court for the Eastern District of Virginia and by FACSIMILE upon same to 703-299-3982 (AUSA Spencer), 804-771-2316 (AUSA Novak) and 212-637-0097 (AUSA Raskin).

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Kenneth P. Troccoli

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<sup>10</sup> Pursuant to the Court's order of October 3, 2002 (dkt. no. 594), this motion was presented to the CSO for a classification review before filing. That review determined that the pleading is not classified. A copy of this pleading was not provided to Moussaoui until after completion of the classification review.